IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1550 OF 2005

Pundlik Shamrao Raut & Anr. .. Appellants

Versus

Pandurang Raoji Raut (deceased)
through L/rs. & Ors. .. Respondents

Mr.S.S.Shah for appellants

Mr.S.S.Patwardhan for respondents

CORAM : S.C.DHARMADHIKARI, J.

DATE : 8th August 2007.

P.C.

. Heard Mr.Shah for appellants and Mr.Patwardhan for respondent Nos.1, 1(a) to (d),

2(b) to (e), 3 and 4.

2. All other respondents are served but none is appearing for them.

3. Admit. Mr.Patwardhan waives service. Since, notice was issued for final disposal to other respondents and they are proved to be served, their absence should not be an impediment for me to decide this appeal finally at this stage itself, with the consent of both Mr.Shah and Mr.Patwardhan.

4. The appellants are original defendant Nos. 1 to 3. Respondents for whom Mr.Patwardhan appears are the original plaintiffs.

5. Original plaintiffs filed a suit in the Court of 10th Joint Civil Judge Kolhapur being Regular Civil Suit No.640 of 1994 claiming partition and separate possession of the property

so also seeking permanent injunction.

6. The suit was dismissed in its entirity by the trial court on 16th April 2001. Original plaintiffs preferred an appeal before the lower appellate court, which appeal has been allowed and that is how original defendants are in second appeal.

7. The lower appellate court while allowing the appeal and setting aside the decree of the trial court, granted in favour of respondents - plaintiffs, the relief of partition and separate possession. However, it dismissed the prayer of plaintiffs for perpetual injunction to restrain defendants from obstructing their joint possession over the suit property. The lower appellate court declared that plaintiff Nos. 1 to 4 have half share jointly in the suit property and they are entitled to partition and separate possession of their share. It is pertinent to

note that the lower appellate court also declared that defendant Nos. 1 to 3 who are appellants before me have 1/4th share jointly in the suit property along with defendant Nos. 4 to 9.

8. Mr.Shah for appellants states that if this court is of the view that the judgement and decree of the lower appellate court needs to be interfered with and is ultimately set aside, he would have no objection if the appeal being heard in its entirity and in that event appellants would not make any grievance with regard to share that is awarded to them in the suit property.

9. The very purpose of issuing notice and with intent to have this matter heard finally is to see that the family disputes are brought to an end atleast at the level of this Court and if the matter requires remand the same should be done expeditiously. The notices having been issued to all respondents who are the original defendants,

their absence today after having proof of the notice being received by them means, no grievance can be made by them that they are deprived of their shares in the suit property even if the Appeal is disposed off finally. More so, when I am of the view that following substantial questions of law would arise in the second appeal:-

(a) Whether, the lower appellate court, as a court of first appeal, was justified in reversing a decree of the trial court, without in any manner adverting to the contentions based upon an application made before it, on jurisdiction of the civil court?

(b) Was the lower appellate court obliged to give ruling one way or the other on an Application preferred by the present appellants, requesting the issue

of tenancy of the parties being decided by Reference under the Bombay Tenancy Act and exercising powers conferred vide Section 85A thereof?

(c) Whether the lower appellate court was justified in cryptically observing that the issue of limitation needs to be answered in favour of repondent plaintiff and against the present appellant, more particularly when it observes that the trial court's findings cannot be said to be vitiated altogether on this issue?

10. With the assistance of Mr.Shah and Mr.Patwardhan I have perused the impugned judgement. Mr.Patwardhan with his usual persuasive efforts could not point out to me any elaborate discussion on the rival pleas and reference to the evidence on record in the impugned judgement, while answering points framed

by the lower appellate court for its determination, in favour of the original plaintiff. The Lower appellate court, refuses while referring to the application made before the trial court as also reiterated before it, frame the issue of tenancy. However, it has not assigned any reasons as to why this application deserves to be dismissed. Further the lower appellate court holds that when the suit is based on title, it was necessary for the present appellant to plead and prove adverse possession. However, while answering that point in favour of plaintiff and against the present appellant, neither any reference is made to the rival pleadings nor the relevant provisions of the Statute. There is no reference to the rival contentions on this plea. Insofar as the question of limitation is concerned, the lower appellate Court has made a reference to the plea of tenancy raised, but without in any manner commenting upon its tenability it has held that

when the plea of tenancy is raised, there cannot be at the same time a assertion of ownership and this being self-destructive plea, issue of limitation needs to be answered in favour of plaintiff.

11. In my view, the first appellate court has failed to perform its duty in accordance with law. It is well settled that the first appellate court has before it a Original Decree, of which, validity and legality can be tested completely. In other words, the decree is open for being interfered with on questions of facts as well as law. Such duty has to be performed by not only referring to the pleadings, rival contentions but the material produced on record. The oral and documentary evidence must be weighed as if the Court is performing its duty par with that of the trial court. Elaborate powers are available in law for the first appellate court to consider the appeal against a decree. In such circumstances,

approach of lower appellate court in this case, hardly meets these requirements. I am satisfied from a perusal of the subject judgement that on the vital issues its order is not only cryptic and unreasoned but fails to take into account the contentions as also the materials produced.

12. The proper course, therefore, would be to set aside the same as being vitiated on the grounds mentioned above. The necessary consequence would be restoration of appeal to the file of lower appellate court for being heard afresh and disposed of on merits and in accordance with law, uninfluenced by any observations and conclusions rendered earlier. It would be open for the parties to make out a case for either reversal of the decree of the trial court or maintaining it. All grounds raised are, therefore, available to be pressed by the appellant before lower appellate court. In the result, the Second Appeal succeeds. The

Judgement of the lower appellate court dated 10th August 2005 Exh."A" is set aside. Regular Civil Appeal No.306 of 2001 is restored to the file of the Dist.Court Kolhapur for being heard afresh on merits and in accordance with law. It is clarified that I have not pronounced upon the rival contentions on merits and jurisdiction and they are open for being urged after remand. The Lower Appellate Court's judgement is set aside only on the limited grounds pointed out above.

13. Since the suit is for partition and separate possession and senior citizens being involved, the lower appellate court to endeavour and dispose of the same as expeditiously as possible and within a period of six months from the date of receipt of the order of this Court. Parties to appear before the lower appellate court on 21st August 2007.

(S.C.DHARMADHIKARI, J)